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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-183

Supreme Court, U.S.
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THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

*Petitioners,*

v.

THE COUNTY OF RIVERSIDE, a Political Subdivision of the STATE OF CALIFORNIA,

*Respondents.*

## REPLY OF NATIVE AMERICAN RIGHTS FUND, CALIFORNIA INDIAN LEGAL SERVICES, DINEBEIINA NAHIILNA BE AGADITAHE, AND ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., AS AMICI CURIAE TO MEMORANDUM FOR THE UNITED STATES

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In concluding that the basic question raised in this case has already been decided by this Court, the Solicitor General relies on a series of cases decided twenty to thirty years ago. Taken together, these cases stand for one basic proposition: that federal and state "instrumentalities" are not, by virtue of that status alone, immune from taxation by the other sovereign. This proposition does not control in this case.

The Solicitor General almost completely overlooks a more recent series of cases striking out in a different direction. Typical of these cases is *Squire v. Capoeman*, 351 U.S. 1 (1956), with which the Solicitor General grapples so unsuccessfully. Memorandum for United States as *Amicus Curiae*, p. 8, n. 7. *Squire*, along with *Williams v. Lee*, 358 U.S. 217 (1959), *Federal Land Bank v. Board of County Commissioners*, 368 U.S. 146 (1961), and *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), strike down federal and state taxes, and other state efforts infringing on the activities of federal instrumentalities, when the taxes and other state efforts are inconsistent with the underlying purposes of the instrumentality, or of the policies pursuant to which the instrumentality is acting.

Thus, in *Squire* this Court held that the proceeds of the sale of timber on Indian lands were not subject to the federal income tax on capital gains because "it is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking" in causing the Indian lands to be allotted. 351 U.S. at 10. In *Federal Land Bank*, the Court assessed the validity of a state tax on mineral rights held by the federal instrumentality in light of its effect on the Congressional objective in establishing the Federal Land Bank. Since the federal goal was dependent upon maximization of the Bank's profits and since the tax reduced these profits, the state tax was held invalid. *Compare United States v. Detroit*, 355 U.S. 466 (1958), in which the achievement of the principal federal objective, the use of the government's physical plant for industrial purposes, was not at all inconsistent with the levy of a possessory interest tax on the government's lessee.

In *Warren Trading Post*, conspicuous by its absence from the Solicitor General's Memorandum, this Court voided a state sales tax levied against sales of a retail trading business on an Indian reservation because of the possible adverse effects of the tax on the comprehensive federal policy regu-

lating traders on reservations.[1] In *Warren Trading Post*, unlike this case, there was no act of Congress that even arguably granted immunity from the state tax. And in *Williams v. Lee*, this Court held that Arizona courts did *not* have jurisdiction of a civil suit against reservation Indians for goods sold to them by a non-Indian operating a store on the reservation because the existence of state court jurisdiction would interfere with the dominant federal policy of encouraging reservation Indians to make their own laws and be ruled by them.[2]

In this sense, this Court's reasoning in *United States v. Rickert*, 188 U.S. 432 (1903) is still valid today. *Rickert* held that the state could not tax either an Indian's permament improvements on an allotment or his personal property (such as cattle and horses) issued by the United States because the effect of permitting the tax would be to defeat the basic purposes of federal Indian policy. *See generally* Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF. L. Rev. 1261 (1971).

As we have shown in our *amicus* briefs in support of the petition for certiorari, economic development of

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[1] In the *Warren Trading Post* opinion, this Court pointed out that the federal government pays for most of the services needed by the Indians which the state provides for other citizens (380 U.S. at 690-691), thus effectively answering the Solicitor General's fears that a ruling in the petitioners' favor would unfairly burden local taxpayers. In addition, we wish to point out the obvious: that property taxes are only one form of revenue generated by the states and their political subdivisions, that Indians and their lessees pay other forms of state taxes. Furthermore, state coffers are substantially enriched by the income and sales generated by Indian lessees. These are precisely the kind of equities that Congress is best equipped to evaluate (*see infra*, pp. 5-6).

[2] As in *Williams v. Lee*, the action of the state here has the effect of interfering with an essential aspect of tribal self-government: the power of the tribe to tax lessees. See our *amicus* briefs in support of the petition.

Indian reservations, leading to economic self-sufficiency, is the major federal Indian program today. As both courts below specifically found, application of the county's possessory interest tax to lessees of Indian land would hinder this program. Not only would the tax have the obvious effect of reducing rental income to the Indian lessors, it might often determine whether development takes place on or off the reservation (Tr. 80).

The consequences of the tax here are much more harmful to a more important and widespread federal program than that which was involved in *Warren Trading Post*. This tax should be held invalid not just because it is levied against a federal instrumentality, but because it is inconsistent with the federal government's program to encourage and promote the economic development of Indian lands.

The Solicitor General recognizes, as do we, the paramount power of Congress to legislate the ultimate answer to the issue presented here. The question for this Court is what is to be done in the absence of a clear and specific Congressional directive. It is true that in *United States v. Detroit, supra*, this Court let stand a possessory interest tax levied against a lessee of the government, leaving it up to Congress to change that result if it so desired. However, the opposite rule applies to the state-Indian relationship. As stated by Mr. Justice Black for a unanimous court in *Williams v. Lee, supra*,

> The cases in this Court have consistently guarded the authority of Indian governments over their reservations . . . . If this power is to be taken away from them, it is for Congress to do it. 358 U.S. at 223.

In fact, Congress has acted to make certain state imposed taxes applicable to Indian property. *See, e.g.*, 25 U.S.C. §398c and the Brown-Stephens Act, Public Law 291 of December 30, 1916, 39 Stat. 865, held constitutional in *All-*

*baugh v. United States*, 184 F.2d 109 (8th Cir. 1950), cert. den., 340 U.S. 905 (1950).[3]

If the unique situation of the Agua Caliente Indians makes it equitable for the County of Riverside to levy a possessory interest tax, Congress can and should rectify the situation. Only Congress is equipped to take into account the major differences among the nation's Indian reservations and their special relationships to the states and counties within whose boundaries they lie. Courts should not legislate a solution that would seriously undermine a vitally important federal program on Indian reservations throughout the country at the expense of the nation's most economically deprived minority group.

We respectfully suggest that the Solicitor General is seeking to dispose of this case on the basis of outdated, thirty year old precedents when all of the cases decided by this Court within the past fifteen years indicate that the result here is, at a minimum, very much in doubt. We respectfully submit that certiorari should be granted, if for no other reason than to clarify and reconcile these two lines of cases.

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[3] The very existence of these statutes, one of which, 25 U.S.C. § 398c, expressly authorizes a state possessory interest tax on oil and gas lessees of certain Indian lands, indicates that Congress operates on the assumption that its specific approval is required before any interests in Indian land can be taxed.